

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Petition of the Verizon Telephone	)	
Companies for Forbearance under	)	WC Docket No. 04-440
47 U.S.C Sec. 160(c) from Title II	)	
and <i>Computer Inquiry</i> Rules with respect to	)	
Their Broadband Services	)	

**OPPOSITION OF CLOSECALL AMERICA, INC, CTC COMMUNICATIONS CORP.,  
FDN COMMUNICATIONS, INC., GILETTE GLOBAL NETWORKS, INC D/B/A  
EUREKA NETWORKS, PAC-WEST TELECOMM, INC AND TDS METROCOM, LLC**

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February 8, 2005

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For the reasons stated below, CloseCall America, Inc, CTC Communications Corp., FDN Communications, Inc., Gillette Global Networks, Inc. d/b/a Eureka Networks, Pac-West Telecomm, Inc., and TDS Metrocom, LLC (“Joint CLECs”) request that the Commission deny the above-captioned petition filed by the Verizon Telephone Companies (“Verizon”).

**I. INTRODUCTION AND SUMMARY**

Verizon’s petition should be dismissed, first and foremost, because it fails to satisfy the statutory standard for forbearance enumerated in Section 10 of the Communications Act. For the same reasons Joint CLECs urged rejection of the similar petition filed by BellSouth, Joint CLECs urge the Commission promptly to reject Verizon’s petition.

Verizon’s petition suffers similar flaws as BellSouth’s nearly identical petition. Neither Verizon nor BellSouth has acknowledged, much less addressed, that there is no intermodal competition in the wholesale market for broadband access to customers’ premises. This is

particularly important because the Commission designed the *Computer II/III* safeguards to assure a viable wholesale market for last mile access to customers. Verizon claims that it has an economic incentive to provide wholesale services as it currently is obligated to provide under Title II and the Commission's rules. However, this claim lacks credibility; why is Verizon fighting so hard to be relieved of its obligation to provide wholesale services if it intends to continue providing such services anyway? In the retail residential market, there is at most a duopoly for the provision of high-speed Internet access service, and the Commission has recognized that duopoly competition is insufficient to replace regulation to assure that rates for service are reasonable and nondiscriminatory. Finally, there is limited or no intermodal competition in the retail business broadband market as demonstrated in the Commission's *Triennial Review Remand Order*.

Even overlooking its failure adequately to address the wholesale market, Verizon fails to justify forbearance under the standards of Section 10 of the Act. In particular, Verizon fails to provide the rigorous identification and analysis of markets that the courts have required in order for the Commission to forbear from important statutory and regulatory requirements. Thus, Verizon's forbearance request could be read to encompass special access services that the Commission has previously excluded from the scope of contemplated broadband relief. The petition should be denied for these reasons alone.

Therefore, the Commission may not conclude, on the present record, that intermodal competition is sufficient to assure reasonable and nondiscriminatory terms and conditions of service for any broadband service. Even if there were sufficient competition to support a finding that ILECs are non-dominant in some broadband markets, such competition would not warrant the sweeping forbearance Verizon seeks, because the Commission has continued to apply the

core requirements of Title II even to non-dominant carriers. Accordingly, the Commission should promptly deny Verizon's petition.

## **II. VERIZON CANNOT SHOW THAT THE FORBEARANCE STANDARD IS MET**

The standard for review of Verizon's Section 10 forbearance petition requires the Commission to evaluate each prong of the statutory forbearance standard. If the Commission finds the petition lacking on any one of the three requirements, the Commission must dismiss the petition.<sup>1</sup>

Despite the role of cable companies in providing broadband service, ILECs retain market power in the provision of broadband service in both the residential market and the business market. In the residential markets where cable companies also provide broadband service, the ILECs share their market power. There are, however, residential markets where the ILECs do not face competition from cable, and business markets where cable modem service does not meet the needs of business customers, allowing the ILECs to retain sole possession their market power.

For the same reasons Joint CLECs oppose BellSouth's nearly identical petition in WC Docket 04-405, the Joint CLECs oppose Verizon's petition.<sup>2</sup> Verizon has not and can not show that enforcement of Title II and *Computer Inquiry* regulation is no longer necessary to "ensure that the charges, practices, classifications, or regulations for its broadband services, in any market, are just and reasonable and not unjustly or unreasonable discriminatory."<sup>3</sup> Similarly, as with BellSouth's petition, Verizon can not show that enforcement of the *Computer Inquiry* and

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<sup>1</sup> *CTIA v. FCC*, 330 F.3d, 502, 509 (D.C. Cir. 2003).

<sup>2</sup> Comments of FDN Communications, Inc & Pac-West Telecomm, Inc., WC Docket 04-405, filed Dec. 20, 2004 ("WC Docket 04-405, Joint CLEC Comments").

<sup>3</sup> *See Id.* 13-21.

Title II regulation of broadband is not necessary for the protection of consumers or that forbearance from applying the *Computer Inquiry* rules and Title II is in the public interest.

Verizon claims that neither Title II nor the *Computer Inquiry* rules remain necessary because of the presence of cable and other firms that provide marginal broadband competition such as Wi-Fi, satellite, broadband over powerline (“BPL”) or wireless.<sup>4</sup> In contrast, evidence and comments in other related proceedings show that given the substantial market power the ILECs retain, and the inability of other regulatory tools to discipline possible abuse, the effective repeal of Title II of the Act requested by Verizon is wholly unwarranted.

**A. Verizon Retains Market Power in All Broadband Markets**

While Verizon claims it lacks market power because the presence and success of the cable companies, nothing in their petition, or reply comments in the *BellSouth Forbearance Petition Proceeding*, presents any new evidence contradicting the decades of precedent providing that the presence of two viable competitors in a market means the firms *share market power*. In sharing that market power, *both* firms retain an incentive to exclude competitors and raise rates.<sup>5</sup> Moreover, cable provides such nominal competition in the business market that the ILECs retain their exclusive power in that market. Thus, in both the residential and business markets, the protections of Title II and the Commission’s *Computer Inquiry* rules remain necessary to prevent unjust and unreasonable practices and rates, to protect consumers, and are in the public interest.

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<sup>4</sup> Verizon Petition at 6-7.

<sup>5</sup> See WC Docket 04-405, Joint CLEC Comments at 27.

1. **At a Minimum, Verizon Shares Market Power in the Residential Market**

The Commission has previously found that competition sufficient to diminish the need for regulation will not exist where the market is primarily allocated between two dominant firms.<sup>6</sup> Courts have recognized that a duopoly in the market is the equivalent of a monopoly because, “firms in a concentrated market ... in effect share monopoly power by recognizing their shared economic interests and their interdependence with respect to price and output decisions.”<sup>7</sup> A “durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices.”<sup>8</sup> Thus, at a minimum, even where the ILECs share their broadband monopoly with cable, they have market power and the incentive to abuse that power.

There are, of course, areas throughout the country where cable does not compete with DSL. Many mass-market consumers lack access to cable modem service.<sup>9</sup> In rural areas, ILECs have used regulatory tools available to them as regulated common carriers under Title II to deploy broadband where cable facilities do not exist. The “current level of broadband deployment in small rural markets” would not be possible without the current Title II regulatory structure.<sup>10</sup>

Further, there is no reliable evidence to suggest that new intermodal alternatives will change the broadband mass market from a duopoly to a fully competitive market. Nor is there evidence that any “of these technologies and service categories has yet posed anything like a

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<sup>6</sup> See *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee*, CS Docket No. 01-348, Hearing Designation and Order, FCC 02-284, 17 FCC Rcd 20559, 20684 ¶¶ 103-105 (2002) (“*EchoStar Merger Order*”).

<sup>7</sup> *Brooke Group v. Brown & Williamson*, 509 US 209, 227 (1993).

<sup>8</sup> *FTC v. Heinz*, 246 F.3d 708, 725 (D.C. Cir. 2001).

<sup>9</sup> See WC Docket 04-405 AT&T Comments at 41.

<sup>10</sup> WC Docket 04-405, NECA Comments at 4.

significant antidote to the incumbents market power.”<sup>11</sup> Verizon does not even dispute that competition today from satellite, BPL, and other technologies is minimal to the point of being irrelevant.<sup>12</sup> Instead, Verizon claims the Commission must predict “future market conditions” rather than simply assess the market conditions today, citing to snippets of the Commission’s decision in the *Bell Atlantic-NYNEX Merger Order*. However, the Commission should not afford significant weight to predictions of future intermodal competition, particularly when there is no evidence that the underlying technology is commercially viable.

First, Verizon’s reliance on the *Bell Atlantic-NYNEX Merger Order* is misplaced. In that order, the Commission stated that it could use predictive judgments to assess how the merger might effect competition in the future.<sup>13</sup> However, nowhere did the Commission state it must do so. The Commission can, and should, decide this petition based on the conditions of the market today, rather than making predictive judgments that are bound to be inaccurate.<sup>14</sup>

Second, Verizon misconstrues the scope of the Commission’s authority to make predictive judgments cited in the *Bell Atlantic-NYNEX Merger Order*.<sup>15</sup> In Paragraph 7 of the order, the Commission simply observed that its merger order would examine markets as it expects they will exist after a Bell Company receives 271 authorization, and “the most critical

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<sup>11</sup> See *Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*) Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12618 ¶ 164 (1997) (“*LMDS Order*”)

<sup>12</sup> Verizon Petition at 6-7.

<sup>13</sup> *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19989-90 ¶ 7 (1997) (“*Bell Atlantic-NYNEX Merger Order*”).

<sup>14</sup> See *id.* ¶ 164.

<sup>15</sup> See Verizon Petition at 7.

provisions of Sections 251 and 252” have been implemented.<sup>16</sup> Thus, the Commission did not step out on a limb to predict the commercial and technological viability of technologies that have yet to be deployed to consumers on any wide scale, but rather assumed the completion of several regulatory proceedings that were under way. As the Commission observed in the *LMDS Order*, when “none of these technologies and service categories has yet posed anything like a significant antidote to the incumbents market power” the Commission’s analysis should emphasize current market conditions and the incumbents’ current market power.<sup>17</sup>

Regardless of the Commission’s authority to make predictive judgments concerning the evolution of communications markets, Commission decisions must offer a “sufficient relationship between the Commission’s conclusion and the factual bases in the record upon which it relied.”<sup>18</sup> Even when making predictive judgments, the Commission remains bound to explain:

the reasons why (it) chooses to follow one course rather than another. Where that choice purports to be based on the experience of certain determinable facts, the (agency) must, in form as well as substance, find those facts from evidence in the record. By the same token, when the (agency) is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, (it) should so state and go on to identify the considerations (it) found persuasive.”<sup>19</sup>

Thus, the ability to render predictive judgments using the “public interest” standard does not confer unfettered discretion on the agency administering it.<sup>20</sup>

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<sup>16</sup> See *Bell Atlantic-NYNEX Merger Order* at 20011-12 ¶ 41.

<sup>17</sup> See *LMDS Order* at 12618 ¶ 165.

<sup>18</sup> *United States v. Allegheny-Ludlum Steel Co.*, 406 U.S. 742, 755-56 (1972).

<sup>19</sup> *Air Products & Chemicals, Inc. v. Federal Energy Regulatory Commission*, 650 F.2d 687, 699 (5th Cir. 1981).

<sup>20</sup> See *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 891 F.2d 304, 308 (D.C. Cir. 1989)

In other words, while the Commission is not bound by the standard of proof required in the courts, the Commission remains bound to rest its predictions on fact rather than fantasy. As the Commission is painfully aware, predictions of future broadband competition from the electric power industry and wireless broadband technology have been plentiful over the last decade and beyond. However, these predictions have yet to come true. Given the history of empty promises and inaccurate predictions, the Commission cannot easily justify Verizon's ambitious forbearance proposal.

In fact, the Commission should be extremely cautious in prematurely granting ILECs substantial relief from the rigors of Title II and *Computer Inquiry* regulation. As a leading Antitrust scholar observed, a concentrated market structure awaiting effective entry by a new competitor:

“is potentially dangerous to consumers and should not be discounted too quickly without substantial supporting evidence that entry is likely to occur, to be effective in maintaining or restraining prices near the competitive level, and to do so in a timely fashion. The more concentrated the market ... the more convincing must be the evidence of likely, timely and effective entry.”<sup>21</sup>

In particular, the Commission has a policy of refraining from wild speculation regarding the development of alternative last mile technologies, to which it should adhere in this instance. For example, in the 1997 *LMDS Order*, the Commission restricted the ability of incumbent cable companies and ILECs to obtain LMDS licenses in their own incumbent territories.<sup>22</sup> The Commission observed that despite belief that there were sources of likely or potential competition in video and local telephony, “however optimistic those beliefs may be, they do not

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<sup>21</sup> 2A, Phillip Areeda, *Antitrust Law*, ¶ 423 (2002).

<sup>22</sup> See *LMDS Order*, at 12556 ¶ 13.

change the fact that, at this time, LECs and cable firms hold market power.”<sup>23</sup> The Commission thus determined, “to assert that competition from these various sources is likely to arise requires a great deal of speculation.”<sup>24</sup> Because “none of these technologies and service categories has yet posed anything like a significant antidote to the incumbents’ market power,” the Commission declined to predict their impact on the market in the future and declined to base regulatory policy on such predictions.<sup>25</sup>

Principles of antitrust law also counsel the Commission against wild speculation regarding the competitive impact of nascent technology in the broadband market. These principles counsel that the Commission should only remove regulatory obligations where “effective entry is certain.”<sup>26</sup>

Because effective entry was not certain, the Commission’s hesitation in the *LMDS Order* was justifiable and should be applied in the present instance. “Effective entry” of intermodal competition broadband competition is far less certain. The failure of previous efforts to provide commercially viable wireless broadband access are well documented, and the current efforts at delivering wireless broadband remain in the developmental stages. As the Wall Street Journal recently observed:

“Wireless-broadband services have a rocky history. Companies such as Winstar and Teligent tried to offer similar services during the telecom boom of the late 1990s, with limited success. Sprint's efforts with so-called fixed-wireless technology led to a \$1.2 billion write-down.

For the technology to get even more affordable, experts say the much-hyped WiMAX technology needs to be certified and standardized, which could still be a year away, and another year

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See id.*

<sup>26</sup> 2A, Areeda, *Antitrust Law*, ¶ 422 (2002), pp. 74.

after that before it is widely available in laptops and other devices.”<sup>27</sup>

In the *TRO*, the Commission discounted mass-market broadband competition from the wireless sector, observing that “fixed wireless and satellite services remain nascent technologies, with limited availability.”<sup>28</sup> At least in the case of wireless broadband competition, effective entry remains uncertain and cannot form the basis of the relief Verizon requests.

Similarly, the Commission has predicted competition from electric utility communications services for years while no viable competition has taken root.<sup>29</sup> The Commission has also explored the promises of advanced fiber deployments for decades, and despite these promises, they have yet to bring any broad benefit to consumers.<sup>30</sup>

In contrast, market conditions today unequivocally show that there is currently no viable large-scale competitor to DSL or cable modem broadband services.<sup>31</sup> Simply because a market is evolving rapidly does not mean that new entrants are successfully entering the market and providing competitive services. In the face of facts that current entrants have not been able to establish a foothold in the market, the Commission should decline the RBOC invitation to predict that the future of BPL, WiMax and other nascent technologies will succeed where others have failed.

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<sup>27</sup> Jesse Drucker and Almar Latour, Internet and Phone Companies Plot Wireless-Broadband Push, *THE WALL STREET JOURNAL*, January 20, 2005, p. A10, viewed January 24, 2005 at [http://online.wsj.com/article\\_print/0,,SB110617646006230682,00.html](http://online.wsj.com/article_print/0,,SB110617646006230682,00.html).

<sup>28</sup> *TRO* ¶ 231.

<sup>29</sup> *1995 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, ¶ 120 (1995) (Commission observed that electric utilities that have incurred substantial costs to deploy networks that reach nearly every household in the country could compete with cable companies).

<sup>30</sup> See e.g. Robert Pepper, *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policies, and Institutional Change*, Office of Policy and Plans Working Paper No. 24, ¶¶ 21, 24 (1988).

<sup>31</sup> WC Docket 04-405, Joint CLEC Comments at 18.

## 2. Verizon Maintains Market Power in the Enterprise Market

While the ILECs may share market power with cable providers in some markets, in the business market the ILECs retain sole possession of their market power. Verizon's claim that the business market is fully competitive falls short for several reasons. While Verizon claims that the business market is intensely competitive, it fails to acknowledge that the carriers to whom Verizon attributes the competition, rely on the ILEC for provision of the last mile facilities necessary to provide broadband service.<sup>32</sup> The ILECs also mistakenly claim that cable provides significant competition in the broadband market. Finally, Verizon's claim that AT&T and MCI dominate the retail enterprise market rings hollow considering the recent announcements that SBC will acquire AT&T, Qwest is pursuing MCI, and that Verizon itself may bid on Sprint.<sup>33</sup>

The Commission's recent findings in the *TRO Remand Order* regarding competitive impairment in the business market are equally applicable here to support the conclusion that Verizon retains market power in the broadband business market.<sup>34</sup> In that order, the Commission concluded, "the barriers to entry impeding competitive deployment of loops are substantial."<sup>35</sup> For example, the Commission found that CLECs "face substantial operational barriers to constructing their own facilities."<sup>36</sup> Competitors still face "steep economic barriers" to the deployment of last mile broadband facilities,<sup>37</sup> and these barriers "typically make duplication of

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<sup>32</sup> WC Docket 04-405, AT&T Comments at 36-37.

<sup>33</sup> SBC Merger Press Release, Jan. 31, 2005, viewed Feb. 9, 2005 at <http://sbc.merger-news.com/materials/am.html>; Almar Latour and Dennis K. Berman, "Qwest Presses Its Bid for MCI", WALL STREET JOURNAL, p. C1 Feb. 4, 2005; Almar Latour and Dennis K. Berman, "Qwest Plays Field As MCI Gets Coy On Deal Proposal," WALL STREET JOURNAL, p. A3 Feb. 7, 2005.

<sup>34</sup> *Unbundled Access to Network Elements*, WC Docket 04-313, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Order on Remand, FCC 04-290, ¶¶ 187-194 ("TRO Remand Order")

<sup>35</sup> *Id.* ¶ 153.

<sup>36</sup> *Id.* ¶ 151.

<sup>37</sup> *See TRO* ¶ 199.

such facilities uneconomic.”<sup>38</sup> It is natural then that competitors have only built their own last mile broadband facilities to a small percentage of business customers.<sup>39</sup> Facilities based CLECs, such as Time Warner Telecom, still rely on ILEC provided loop facilities at 75% of its customer locations.<sup>40</sup>

In light of this evidence, it is no surprise that the Commission, in the *TRO Remand Order*, rejected ILEC requests to eliminate their obligation to provide unbundled access to high capacity loop and transport facilities.<sup>41</sup> In rejecting the RBOC claims that competitors did not need access to unbundled last mile broadband facilities, Chairman Powell explained, “the record and our analysis demonstrated that competitors still depended significantly on them in the overwhelming majority of markets and, thus, we have required unbundling in those circumstances.”<sup>42</sup>

Verizon, further argues that the *TRO* supports the ILEC position that cable broadband competition obviates the need for continued *Computer Inquiry* safeguards and Title II regulation.<sup>43</sup> However, Verizon’s citation to *TRO* ¶ 292 is misplaced, because that discussion concerns the residential market, not the business market.<sup>44</sup> Verizon’s claims regarding the impact of cable broadband competition in the business market lack evidentiary support. In fact, the Commission has recently observed “Cable modem service is primarily residential service.”<sup>45</sup>

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<sup>38</sup> *TRO Remand Order* Separate Statement of Commissioner Kathleen Abernathy.

<sup>39</sup> See WC Docket 04-405, Time Warner Telecom *et al* Comments at 9 citing RBOC 2004 UNE Report, WC Docket 04-313, filed Oct. 4, 2004 at p. I-2.

<sup>40</sup> See WC Docket 04-405, Time Warner Telecom *et al* Comments at 10.

<sup>41</sup> *TRO Remand Order* ¶¶ 187-194.

<sup>42</sup> Separate Statement of Chairman Powell, *Triennial Review Remand Order Press Release*.

<sup>43</sup> Verizon Petition at 8.

<sup>44</sup> See *TRO* ¶ 292.

<sup>45</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of*

Even BellSouth admits that in many markets cable networks pass, let alone serve, only a quarter of small and medium sized business customers, not including large business customers.<sup>46</sup> Less than 1% of cable modem subscribers are medium or large businesses or government entities.<sup>47</sup>

The *TRO Remand Order* rejects Verizon's confirms that that currently, cable modem service is not a substitute for broadband services that Joint CLECs and other competitors provide in the enterprise market using ILEC supplied wholesale loop facilities.<sup>48</sup> Cable modem service is not an adequate alternative to ILEC services because it is unsuited for most business customers' needs for a number of reasons, including that it is asymmetrical, relatively low bandwidth, and lacks sufficient reliability and security.<sup>49</sup> Therefore, cable operators are unable to provide a serious alternative to serve business customers.

The *TRO Remand Order* categorically rejects Verizon's assertion in its petition that competition from cable companies in the business market effectively disciplines the RBOCs' market power. The Commission explicitly held that the RBOCs provided "little evidence that cable companies are a significant presence in the enterprise loop market."<sup>50</sup> To the extent that cable companies provide service to business customers, it is in the mass market to "small and medium business ... that are near the residential network."<sup>51</sup>

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*the Telecommunications Act of 1996*, GN Docket No. 04-54, Fourth Report to Congress, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208, at p. 14 (rel. Sep. 9, 2004) ("*Fourth Advanced Services Report*").

<sup>46</sup> Ex parte letter of Jonathan Banks, BellSouth, to Marlene H. Dortch, FCC, *Unbundled Access to Network Elements*, WC Docket 04-313, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 at p. 5 (filed Nov. 8, 2004).

<sup>47</sup> *High-Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau (December 2003), Table 1 and Table 3.

<sup>48</sup> *TRO Remand Order* ¶ 193.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

Similarly, the *TRO Remand Order* firmly dismisses Verizon's argument that other intermodal competitors provide significant competition in the business market. Instead, the Commission determined that "the record does not indicate that other intermodal options, such as fixed wireless and satellite, offer significant competition in the enterprise loop market."<sup>52</sup>

Consistent with its decision in the *TRO Remand Order*, the Commission should retain the safeguards of the *Computer Inquiry* rules and Title II because broadband competitors in the enterprise market rely extensively on ILEC last mile facilities.

**B. Verizon Provides No Assurance That it Will Refrain From Exercising its Vast Market Power to Exclude Competitors in the IP-Enabled Marketplace**

Essential to a forbearance analysis under Section 10 is the principle that sufficient competition among entrants may supplant the need for the regulation. Where such competition has yet to take root, commitments from the market participants that they will refrain from acting on their incentive to abuse extensive market power should be expected when pleading for regulatory relief. However, Verizon offers no such commitments. It is readily apparent that Verizon's claim that it seeks broadband relief to provide wholesale services on a commercial basis wholly lacks credibility. It is unlikely that Verizon would devote such a significant effort to obtain relief that it has no intention of using. Instead, it is obvious that Verizon seeks from the Commission a license to discriminate against competitors in the broadband market.

Far from providing assurance of nondiscrimination, Verizon contends that its broadband offerings should at most be considered "private carriage."<sup>53</sup> The cornerstone of private carriage, however, is that the carrier may choose with whom to deal and on what terms and conditions to provide service on an individual basis. Thus, in effect, Verizon, BellSouth and other RBOCs

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<sup>52</sup> *Id.* ¶ 193 n. 508.

<sup>53</sup> *See e.g.* Verizon Petition at 10-11.

candidly ask for the ability to discriminate against competitors and even deny access entirely to them. As already explained in Joint CLECs' comments in the *BellSouth Forbearance Petition Proceeding*, the RBOCs will have substantial incentives to discriminate against competitors in the IP enabled marketplace.<sup>54</sup> On the present record, an RBOC effort to obtain the legal permission to discriminate against competitors requires denial of Verizon's petition.

**C. Verizon Fails to Justify the Unprecedented Step of Forbearance from Application of Title II and *Computer Inquiry* Safeguards**

It is well documented that when the Commission determines that a market is sufficiently competitive so that regulation becomes unnecessary, the Commission, without exception, retains the core protections of Title II. These protections remain as vital backstops against abuse of any deregulation and provide consumers and competitors a forum to air grievances to the extent they arise.<sup>55</sup> Thus, in relieving interexchange carriers of many of the requirements of Title II regulation, the Commission retained core components of Title II such as the prohibitions against unjust and unreasonable practices and discriminatory pricing in Sections 201-202, as well as the right of consumers to file complaints at the Commission under sections 207-208.

Even if forbearance were otherwise justified, which it is not, the ILECs provide no justification that warrants affording them greater relief from regulatory requirements than those the Commission has provided when other markets become competitive, such as CMRS or long distance.

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<sup>54</sup> WC Docket 04-405, Joint CLEC Comments at 23-26.

<sup>55</sup> See WC Docket 04-405, AT&T Comments at 17-18.

### **III. VERIZON’S REQUESTED RELIEF WOULD IMPEDE THE DEPLOYMENT OF BROADBAND**

The Commission has made the deployment of broadband “the central communications policy objective of the day.”<sup>56</sup> To remain consistent with that declared policy objective, the Commission should not entertain policy proposals that would retard the widespread deployment of broadband. Yet the proposals set forth in Verizon’s petition do just that. First, the development of VoIP alone, without eliminating regulations that led to the development of a robust Internet and information services market, will drive broadband investment. Second, rural carriers have provided compelling arguments that elimination of Title II regulation will impede the deployment of broadband in rural areas where geographical, economic and technological factors make broadband costly to deploy.

#### **A. VoIP Will Drive Broadband Investment and Deployment Without any Forbearance**

Verizon contends that the Commission’s statutory goal of promoting broadband investment embodied in Section 706 of the Act compels forbearance.<sup>57</sup> But the opposite is true. IP-enabled services are dependent on the presence of broadband transmission facilities. The availability of broadband transmission facilities on a nondiscriminatory basis and a wholesale market for such facilities will allow the creation of innovative new IP-enabled applications and their introduction into the market.

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<sup>56</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket Nos. 95-20, *1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3021 ¶ 1 (2002) (“*Wireline Broadband NPRM*”), ¶ 1.

<sup>57</sup> Verizon Petition at 12-14.

The goal of broadband deployment thus works hand in hand with the Commission's objective of facilitating the transition to an IP-enabled communications marketplace.<sup>58</sup> In the *IP-Enabled NPRM*, the Commission predicted that the emergence of IP-enabled communications would revolutionize the market, by reducing prices, increasing innovation and promoting individualization of services. Joint CLECs agree with the Commission's prediction. IP-based services are rapidly redefining communications by offering consumers and small businesses a feature-rich, affordable alternative to traditional telephone and data services.

It is essential to the continued development of independent IP-enabled services, including VoIP, that third parties retain access to consumers over the facilities owned by telecommunications companies. Demand for these services in the IP-enabled market will drive demand for the necessary broadband facilities. If however, the owners of transmission facilities can deny their customers access to feature-rich services provided by unaffiliated companies, the demand for those network assets will diminish.

Historically demand for, and innovation in, information services such as VoIP has been generated by the ability of third party providers to access customers using the facilities of telecommunications common carriers. The open nature of the Internet has fostered the commercial development of the Internet and enabled the emergence of IP-enabled services. It would be illogical for the Commission now to shift to a policy that stifles, rather than fosters, such innovation. If the Commission continues to pursue the goal of facilitating and encouraging IP-enabled and other information services, it should act to ensure that innovative companies and innovative services continue to have access to the customers who demand such services. In order to remain consistent with the policy that it espoused in the *IP-Enabled NPRM*, the

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<sup>58</sup> *IP-Enabled Services*, WC Docket 04-36, *Notice of Proposed Rulemaking*, ¶ 5 (rel. Mar. 10, 2004).

Commission should deny Verizon's blunt request that it be permitted to discriminate in favor of its own VoIP and information services, and against independent providers.

Therefore, the Commission should consider carefully whether its decision in this, and other proceedings, would adequately protect consumers from attempts by the communications infrastructure companies to block third-party services in favor of their own service offerings.

#### **B. Rural LECs Rely on Universal Service Funding to Build Out Broadband Networks**

Rural telephone companies oppose the relief Verizon requests.<sup>59</sup> These companies recognize that the current regulatory structure benefits the deployment of broadband, particularly to rural markets where there are no suitable alternatives, including cable available to consumers and the telephone network remains the sole source of delivering broadband capability.

The rural carriers that filed comments in opposition to BellSouth's petition argue forcefully that elimination of Title II regulation for broadband would make it "difficult, if not impossible for rural, high-cost companies to recover their network costs," which in turn would lead to "an increase in the rate" for broadband services.<sup>60</sup> As NTCA explains, "the high cost of providing service in thinly populated rural regions of the country would prevent some smaller telephone companies from offering such services on a deregulated basis."<sup>61</sup>

Similarly, the relief requested would jeopardize the ability of carriers to offer broadband service through tariffs and take advantage of pooling. As NTCA explains "today's levels of broadband deployment in small rural markets simply would not exist without the benefits of

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<sup>59</sup> See WC Docket 04-405, Nebraska Rural Independent Comments at 2; National Telecommunications Cooperative Association Comments at 2 ("NTCA Comments").

<sup>60</sup> WC Docket 04-405 Nebraska Rural Independent Comments at 8-9.

<sup>61</sup> WC Docket 04-405, NTCA Comments at 2.

NECA's tariffs and pools."<sup>62</sup> NECA explains the benefits of its tariff and revenue pool in terms of support for rural broadband, stability and security for the carriers that deploy service.<sup>63</sup>

As with so many other important issues, Verizon in its petition, ignore the impact of forbearance on rural ILECs. The potential impact on rural ILECs precludes the Commission from finding that forbearance would serve the public interest as required under Section 10(a)(3).

#### **IV. THE RBOCS PROPOSE UNLAWFUL FORBEARANCE STANDARDS**

##### **A. The Commission Must Consider Wholesale Intermodal Competition**

Verizon's petition fails to address or acknowledge the absence of wholesale intermodal broadband competition. The courts have found that forbearance from dominant carrier regulation requires "a painstaking analysis of market conditions" supported by evidence.<sup>64</sup> An adequate analysis of intermodal broadband competition would identify the product and geographic markets, the firms that participate in those markets, calculate market shares, analyze supply and demand elasticities and address possible barriers to entry.<sup>65</sup> Verizon fails even to attempt to identify the particular markets in which it seeks regulatory relief in terms of either services or geographic markets even though the Commission has recognized that the retail services product market is distinct from the wholesale product market.

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<sup>62</sup> *Id.* at 3.

<sup>63</sup> WC Docket 04-405, NECA Comments at 4.

<sup>64</sup> *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir 2001) *AT&T Corp. v. FCC*, 236 F.3d 729, 735-737 (D.C. Cir. 2001).

<sup>65</sup> *See, e.g. EchoStar Merger Order*, 17 FCC Rcd 20559 at ¶¶ 105-150; Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, April 2, 1992, revised April 8, 1997.

In 2003, the Commission observed that “no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing ... broadband transmission capabilities to the mass market.”<sup>66</sup>

Instead, Verizon requests forbearance from application of *any* regulation to “broadband.” Broadband, in turn, is not defined as a service but as a technology, *i.e.* “technologies that are capable of providing 200 kbps in both directions.”<sup>67</sup> Although Verizon and the other RBOCs have submitted reams of information purporting to show the existence of intermodal competition, their comments lack any analysis of markets, let alone the “painstaking” and rigorous analysis required by the courts. Absent information concerning the wholesale market, Verizon and its supporters fail to make a threshold showing sufficient for the Commission to consider forbearance. For this reason alone, the Verizon petition must be denied. It is also worth observing that requesting forbearance for a technology is absurd, since the Commission does not apply Title II regulation to technologies but to telecommunications services.

In any event, even if the RBOCs identified the particular markets for which they seek forbearance, they have submitted no information at all showing intermodal competition in the wholesale market for broadband. Although Verizon has made some factual showing regarding intermodal competition, it is limited to showings concerning retail competition at the national level for a particular service — cable modem Internet access service — limited to the residential market. Thus, Verizon points to the fact that ILEC DSL-based Internet access service and cable modem service have roughly split shares for the retail residential market. Absent a showing that there is significant wholesale intermodal broadband competition, in both the residential market and the business market, there is no basis for the Commission to forbear. Forbearance under

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<sup>66</sup> *TRO* ¶ 233.

<sup>67</sup> WC Docket 04-405, BellSouth Petition at 1 n. 1.

Section 10(a)(1) is not available where application of *Computer II/III* and Title II regulation remains necessary to assure that rates for Verizon's broadband access services will be just, reasonable, and nondiscriminatory.

Verizon's failure to provide evidence regarding competition in the wholesale market is a crucial omission because in *Computer II/III* the Commission expressly sought to preserve wholesale offerings. The Commission deemed necessary the *Computer II/III* safeguards that the RBOCs now want eliminated precisely because there were no wholesale alternatives available to independent providers that did not possess last mile connections to customer premises. Thus, RBOC showings of intermodal retail competition are irrelevant to the forbearance relief requested because the *Computer II/III* safeguards are focused on wholesale services provided to ISPs, not the retail services the RBOCs discuss. In this connection, independent broadband service providers do not have any viable last mile alternatives to the current ILEC wholesale common carrier offerings for reaching customers premises. Although independent providers compete against each other, they are all dependent on the ILEC's last mile connections. Thus, *Computer II/III* safeguards remain as valid and necessary today as when they were adopted.

Verizon suggests that the Commission need not define a separate wholesale product market in conducting its forbearance analysis.<sup>68</sup> Verizon's invitation to the Commission to ignore this distinct market should be rejected.

First, Verizon misstates the related antitrust principles for defining the relevant market. Verizon claims that principles of antitrust should prevent the Commission from recognizing a separate product market for *wholesale* broadband transmission.<sup>69</sup> In fact, the particular

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<sup>68</sup> WC Docket 04-405, Verizon Reply Comments filed Jan. 28, 2005 at 6-7.

<sup>69</sup> WC Docket 04-405, Verizon Reply Comments at 9 *citing* 2A Phillip E. Areeda, *Antitrust Law* ¶ 423, at 81-82 (2002).

discussion to which Verizon refers, concerns the factor of supply elasticity, which the Joint CLECs identified as a factor in opposing BellSouth's similar petition.<sup>70</sup> Supply elasticity however begs the question of the appropriate product market. In defining the relevant product market, the Commission is obligated "to delineate markets which conform to areas of effective competition and the realities [sic] of competitive practice."<sup>71</sup> Courts have found that, for example, that there are legitimate distinctions that require considering separate retail and wholesale product markets. In *City of Cleveland v. Cleveland Electric*, the Seventh Circuit found that "the only relevant market ... is the retail electrical power market."<sup>72</sup> The Court found that the retail market was the "only market in which Cleveland Electric and the city currently compete and the only market in which they are ever likely to compete."<sup>73</sup>

Second, the Commission has previously defined a separate wholesale market for broadband transmission. In the *TRO*, for instance, the Commission's impairment analysis for mass-market broadband transmission focused on the wholesale market.<sup>74</sup> Similarly, in its Second Report Order in the *Advanced Services Proceeding* in 1999, the Commission differentiated between the wholesale and retail xDSL market in order to prevent CLECs from obtaining the ILEC bulk xDSL service sold to ISPs under the Section 251(c)(4) resale requirement.<sup>75</sup> In that order the Commission held that "advanced services sold to Internet

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<sup>70</sup> Docket 04-405, Joint CLEC Comments, pp. 19-20.

<sup>71</sup> *City of Cleveland v. Cleveland Electric*, 734 F.2d 1157, 1166 (7<sup>th</sup> Cir. 1984) citing *L.G. Balfour Co v. FTC*, 442 F.2d 1,11 (7<sup>th</sup> Cir 1971).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See e.g. *TRO* ¶ 248 (finding CLECs impaired nationally without access to copper loops despite presence of cable and wireless facilities in some markets).

<sup>75</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd 19237, 19241 ¶ 8 (1999).

Service Providers ... are inherently and substantially different from advanced services made available directly to business and residential end-users.”<sup>76</sup>

Third, this market definition is consistent with market reality. Currently the cable companies do not offer wholesale broadband transmission to ISP and competitive telecommunications providers. They do not participate in this distinct market because the FCC has unlawfully freed them from any compulsion to offer broadband access.

To emphasize further that independent providers lack wholesale alternatives, cable modem service is not sufficient to constrain the ILECs’ market power in the wholesale market for a number of reasons. First, cable operators are under no obligation to make any such offering to competing providers and they do not do so. Cable operators are under no obligation to make such offerings because the Commission in the *Cable Modem Declaratory Ruling* erroneously determined that the transmission component of cable modem service is “telecommunications” but not a telecommunications service. The Ninth Circuit reversed that decision, but instead of choosing to follow through on the obvious consequence that cable operators must offer the underlying transmission component to other providers on a common carrier basis, the Commission has chosen to appeal that decision to the Supreme Court. At this point, cable operators’ broadband transmission services are considered “private carriage” which means essentially that they may choose to whom they will provide service and on what terms and conditions.

Earthlink, which as an ISP is well positioned to know if cable operators make wholesale offerings to ISPs on a private carriage basis, notes that with limited exceptions cable operators

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<sup>76</sup> *Id.*

refuse to sell transmission service to unaffiliated ISPs.<sup>77</sup> Earthlink states that there is not a competitive wholesale market for the last mile and other services they need to provide their broadband retail services. Verizon provides no evidence that ISPs have wholesale alternatives to ILECs' service. Of course, even if there were such cable alternatives, this would show only the existence of a duopoly that, as explained elsewhere in these reply comments, is insufficient to assure that prices are reasonable and nondiscriminatory.

Cable providers also do not participate in the wholesale broadband transmission market because their network is currently ill suited for such a purpose.<sup>78</sup> In other words, even if cable were an alternative source of supply in the wholesale market there is little supply elasticity.

The lack of supply elasticity is even more obvious in the business market where cable operators do not typically serve business customers, or have facilities near such customers.<sup>79</sup> Broadband service providers that want to serve business customers do not have access to a cable alternative to ILEC broadband wholesale services.<sup>80</sup> As discussed above, cable modem service is not an adequate alternative to ILEC services because it is unsuited for most business customers' needs for a number of reasons, including that it is asymmetrical, relatively low bandwidth, and without sufficient reliability and security.<sup>81</sup> Therefore, cable operators are unable to provide a viable wholesale alternative to serve business customers even if they were otherwise willing to do so.

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<sup>77</sup> WC Docket 04-405, Earthlink Comments at 19. See also Opposition of the Federation of Internet Solution Providers of America at 28 – 33.

<sup>78</sup> See WC Docket 04-405, Washington Bureau for ISP Advocacy at 24-25 (cable is a closed network not designed as common carrier facility) ("*ISP Bureau Comments*").

<sup>79</sup> *TRO Remand Order* ¶ 193.

<sup>80</sup> WC Docket 04-405, *ISP Bureau Comments* at 24-26.

<sup>81</sup> *TRO Remand Order* ¶ 193.

Finally, even if there were some wholesale intermodal competition for last mile connections, it does not follow that all Title II regulation may be eliminated. In particular, the Commission has always applied the fundamental obligations of Title II – nondiscrimination, reasonable rates, and the possibility of complaints - to all telecommunications carriers even to those found non-dominant. The mere existence of some competition is therefore not a sufficient basis for eliminating these Title II obligations. The Commission has never granted forbearance from the fundamental common carriage obligations of Sections 201 and 202. Therefore, the requested forbearance must be denied, even if there were sufficient wholesale intermodal competition to make Verizon non-dominant in that market.

## **V. THE PETITION SEEKS DEREGULATION OF SPECIAL ACCESS SERVICES**

As noted above, Verizon fails to provide any analysis of the services or product markets for which it seeks forbearance. Instead, Verizon seeks forbearance for any technology that permits two-way communications greater than 200 kbps. The overly broad petition should be denied, if for no other reason, because the petition would effectively deregulate special access services, which frequently provides a capability far in excess of 200 kbps. Characteristically, Verizon fails to acknowledge that special access is apparently within the scope of the requested relief. Nor does Verizon address, much less demonstrate, that there is any basis for dispensing with the Commission's regulatory program governing special access, although that program is in serious need of reform.<sup>82</sup>

Regulatory oversight of special access service is necessary because the RBOCs have shown that they have the incentive, ability and propensity to discriminate in that market. In

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<sup>82</sup> *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access*, Public Notice, RM No. 10593, DA 02-2913, released October 29, 2002.

December 2004, the Commission found that BellSouth had engaged in unlawful discrimination in the provision of special access service by offering greater discounts to BellSouth's long distance affiliate than to non-affiliated competitors.<sup>83</sup>

In the *Dom/Non-Dom Proceeding*, in which the Commission is considering some of the relief encompassed by Verizon's petition, the Commission specifically excluded special access from consideration.<sup>84</sup> That same consideration should apply here. Although the petition should be denied in its entirety, at a minimum, the Commission should categorically exclude special access from consideration in this proceeding.

## **VI. CONCLUSION**

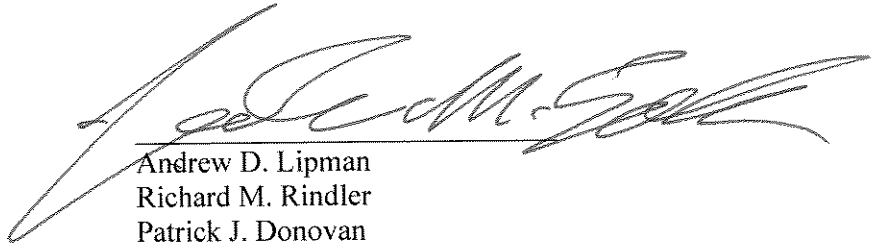
For these reasons, the Commission should dismiss or deny Verizon's above-captioned petition.

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<sup>83</sup> *AT&T Corp. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, FCC 04-278, EB-04-MD-010 (Dec. 9, 2004).

<sup>84</sup> *Review of Regulatory Requirements for Incumbent LEC Transmission of Broadband Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22758 ¶ 22 (2001).

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Andrew D. Lipman", is written over a horizontal line.

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February 8, 2005